

Stephen J. Joncus, OSB #013072
Email: stephen.joncus@klarquist.com
N. Andrew Sfeir, OSB #131787
Email: andy.sfeir@klarquist.com
KLARQUIST SPARKMAN, LLP
121 S.W. Salmon Street, Suite 1600
Portland, Oregon 97204
Telephone: 503-595-5300
Facsimile: 503-595-5301

Attorneys for Plaintiff
CAROL WILSON FINE ARTS, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

CAROL WILSON FINE ARTS, INC., an
Oregon corporation,

Civil No.: _____

Plaintiff,

v.

ZIFEN QIAN, an individual,

Defendant.

**COMPLAINT FOR COPYRIGHT
INFRINGEMENT AND
DECLARATORY JUDGMENT AND
DEMAND FOR JURY TRIAL**

Plaintiff Carol Wilson Fine Arts, Inc., for its Complaint against Defendant Zifen Qian, states and alleges as follows:

NATURE OF THE ACTION

1. This is an action for copyright infringement and declaratory judgment under the laws of the United States (17 U.S.C. § 101, *et seq.*; 28 U.S.C. §§ 2201 & 2202).

THE PARTIES

2. Plaintiff Carol Wilson Fine Arts, Inc. (“Carol Wilson Fine Arts”) is an Oregon corporation with its principal place of business in Portland, Oregon.

3. Defendant Zifen Qian is an individual domiciled in West Linn, Oregon.

JURISDICTION AND VENUE

4. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

5. The Court has personal jurisdiction over Zifen Qian because he resides in West Linn, Oregon.

6. Venue is proper in this judicial district under 28 U.S.C. § 1391(b).

ALLEGATIONS

Carol Wilson Fine Arts

7. Carol Wilson Fine Arts designs, markets, and sells stationery, greeting cards, and other products, incorporating original paintings, illustrations, and other artistic designs.

8. Carol Wilson and Gary Spector founded Carol Wilson Fine Arts. Mr. Spector serves as President. Ms. Wilson serves as Secretary.

9. Carol Wilson Fine Arts has employed artists, including painters, to create original works for incorporation into stationery, greeting cards, and other products. Carol Wilson Fine

Arts has also acquired art from independent contractors.

10. The distinction between the artists whom Carol Wilson Fine Arts employs and those artists who are not employed is quite clear.

11. The artists who are employees of Carol Wilson Fine Arts are paid an hourly wage based on their hours at work.

12. The artists who are employees of Carol Wilson Fine Arts are not paid a royalty or a flat fee for products incorporating the works those artists created.

13. The artists who are employees of Carol Wilson Fine Arts are paid for their time worked, regardless of whether the works created are ultimately incorporated into any products by Carol Wilson Fine Arts.

14. The artists who are employees of Carol Wilson Fine Arts are not paid based on the number of works that are selected for incorporation into products.

15. The artists who are employees of Carol Wilson Fine Arts receive benefits such as health insurance, retirement contributions, vacation, sick time, and the potential for annual bonuses.

16. Carol Wilson Fine Arts provides facilities, equipment, and supplies for its employees who are artists.

17. Carol Wilson Fine Arts does not provide facilities, equipment, or supplies to artists who are independent contractors.

18. Carol Wilson Fine Arts pays an independent contractor only if it chooses to incorporate a work created by the independent contractor into its products.

19. Independent contractors receive payment only when they generate a work that Carol Wilson Fine Arts decides to use.

20. Carol Wilson Fine Arts pays an independent contractor a royalty or a flat fee for artwork that is used in products.

21. Independent contractors do not receive benefits from Carol Wilson Fine Arts such as health insurance, retirement contributions, vacation, or sick time.

Zifen Qian's Work For Carol Wilson Fine Arts

22. On June 4, 1992, Zifen Qian signed an employment agreement with Carol Wilson Fine Arts.

23. A copy of Zifen Qian's employment agreement is attached as Exhibit A to this Complaint.

24. The employment agreement defines Carol Wilson Fine Arts as "Employer" and Zifen Qian as "Employee." (Exh. A, p. 1.)

25. The employment agreement states, in part, that "Employer agrees to employ the Employee." (Exh. A, p. 1.)

26. The employment agreement states, in part, that "Employee shall, at all times, provide services to Employer under Employer's control and direction." (Exh. A, p. 1 (emphasis added).)

27. Zifen Qian's employment agreement makes no mention of any copyright rights or other intellectual property rights, including as to ownership, assignment, or transfer.

28. Zifen Qian worked for Carol Wilson Fine Arts from 1992 to 2013.

29. Zifen Qian worked for Carol Wilson Fine Arts for over 20 years.

30. Zifen Qian's job title during his employment with Carol Wilson Fine Arts was "Artist" or "Senior Artist."

31. The purpose of Zifen Qian's work for Carol Wilson Fine Arts was to create

artwork for Carol Wilson Fine Arts.

32. Zifen Qian created paintings, including watercolors, for Carol Wilson Fine Arts, for incorporation into greeting cards and other products.

33. Mr. Spector and/or Ms. Wilson reviewed and directed the development of the artwork as Zifen Qian created them.

34. The approval of either Mr. Spector or Ms. Wilson was required before any of Zifen Qian's works would be considered finished, and before any could be incorporated into Carol Wilson Fine Arts' products.

35. Over the course of Zifen Qian's term at Carol Wilson Fine Arts, Carol Wilson Fine Arts assigned many projects for Zifen Qian to complete for the company, including the creation of watercolor paintings.

36. The paintings that Zifen Qian created for Carol Wilson Fine Arts were painted on Carol Wilson Fine Arts' premises.

37. As part of his creation of paintings for Carol Wilson Fine Arts, Zifen Qian would research potential subjects for his artwork.

38. This research included, at times, Zifen Qian photographing potential subjects for artwork.

39. Carol Wilson Fine Arts paid Zifen Qian for his time researching and photographing potential subjects.

40. Carol Wilson Fine Arts reimbursed Zifen Qian for his expenses incurred in researching and photographing potential subjects.

41. The paintings that Zifen Qian created for Carol Wilson Fine Arts were created with materials, including paint, provided by Carol Wilson Fine Arts to Zifen Qian.

42. Carol Wilson Fine Arts paid Zifen Qian an hourly wage.
43. Carol Wilson Fine Arts provided Zifen Qian with health insurance.
44. Carol Wilson Fine Arts provided Zifen Qian with annual paid vacation and paid sick time.
45. Carol Wilson Fine Arts provided Zifen Qian with contributions to an Individual Retirement Account (IRA).
46. Carol Wilson Fine Arts completed an I.R.S. Form W-2 for Zifen Qian every year from 1992 through 2013.
47. Carol Wilson Fine Arts occasionally paid Zifen Qian a bonus, typically at year-end.
48. These year-end bonuses were based on Zifen Qian's work and performance over the year.
49. These year-end bonus were not royalties.
50. At one point, Zifen Qian approached Mr. Spector regarding the possibility of being paid as an independent contractor on a royalty basis, instead of receiving an hourly wage as an employee.
51. At that time, Mr. Spector explained to Zifen Qian how the royalty payment structure worked for an independent contractor. Royalty income would be less predictable and may be less; and no benefits would be provided.
52. Subsequently, Zifen Qian declined to pursue leaving the employment of Carol Wilson Fine Arts, and changing his compensation to being paid on a royalty basis. Carol Wilson Fine Arts continued to pay Zifen Qian an hourly wage.
53. Zifen Qian also created other artworks, including oil paintings, not for Carol

Wilson Fine Arts.

54. These other artworks were not painted with Carol Wilson Fine Arts' materials.

55. These other artworks were not painted in Carol Wilson Fine Arts' facility or on its premises.

56. These other artworks were not painted during Zifen Qian's working hours for Carol Wilson Fine Arts.

57. Carol Wilson Fine Arts did not pay Zifen Qian for these other artworks.

58. Carol Wilson Fine Arts did not incorporate these other artworks of Zifen Qian into any of its products.

59. Zifen Qian publicly exhibited some of these other artworks, including in New York City.

60. Carol Wilson Fine Arts did not object to Zifen Qian's creation of these other artworks.

61. On September 27, 2013, Carol Wilson Fine Arts terminated Zifen Qian's employment.

62. Zifen Qian signed a severance agreement on September 28, 2013 and received his first severance payment on November 1, 2013.

63. A copy of Zifen Qian's severance agreement is attached as Exhibit B to this Complaint.

64. Zifen Qian's severance agreement defines Defendant Zifen Qian as "Employee." (Exh. B, p. 1.)

65. Zifen Qian's severance agreement provides, in part, that "Employee's employment with Employer will terminate" (Exh. B, p. 1 (emphasis added).)

66. Zifen Qian signed the severance agreement in a signature block under the caption “Employee: Zifen Qian.” (Exh. B, p. 10.)

67. Zifen Qian’s severance agreement required him to return all of Carol Wilson Fine Arts’ property to Carol Wilson Fine Arts.

68. As of the filing of this Complaint, Zifen Qian has not returned all of Carol Wilson Fine Arts’ property to Carol Wilson Fine Arts.

69. Zifen Qian’s severance agreement makes no mention of any copyright rights or other intellectual property rights, including as to ownership, assignment, or transfer.

70. All artwork that Zifen Qian created for Carol Wilson Fine Arts was created within the scope of his employment for Carol Wilson Fine Arts.

71. All artwork that Zifen Qian created for Carol Wilson Fine Arts was work made for hire under the U.S. Copyright Act.

72. Carol Wilson Fine Arts is the rightful owner of all copyrights to all artwork that Zifen Qian created for Carol Wilson Fine Arts.

73. Zifen Qian has no copyright rights to any artwork that he created for Carol Wilson Fine Arts.

The Works At Issue

74. Zifen Qian is displaying, or has displayed, various works on his website, <http://zifenqian.com/>, including each of the following works (collectively, “the Watercolors”):

Watercolor 1



Watercolor 2



Watercolor 3



Watercolor 4



Watercolor 5



Watercolor 6



Watercolor 7



Watercolor 8



Watercolor 9



Watercolor 10



Watercolor 11



Watercolor 12



Watercolor 13



Watercolor 14



Watercolor 15



Watercolor 16



Watercolor 17



Watercolor 18



Watercolor 19



Watercolor 20



Watercolor 21



75. Zifen Qian painted each of the Watercolors.
76. Zifen Qian painted each of the Watercolors for Carol Wilson Fine Arts.
77. Zifen Qian painted each of the Watercolors within the scope of his employment for Carol Wilson Fine Arts.
78. Zifen Qian painted each of the Watercolors as an employee of Carol Wilson Fine Arts.
79. Each of the Watercolors is a work made for hire under the U.S. Copyright Act.
80. Carol Wilson Fine Arts holds the copyrights to each of the Watercolors.
81. Zifen Qian has no copyright rights in the Watercolors.
82. Carol Wilson Fine Arts holds registered U.S. copyrights in visual materials that incorporate seventeen of the Watercolors (these seventeen are, collectively, “the Registered

Works,” listed below along with their Copyright Registration Numbers and Dates of Registration):

Watercolor 2



Reg. No. VA 1-258-015

March 17, 2004

Watercolor 4



Reg. No. VA 1-656-333

March 31, 2008

Watercolor 6



Reg. No. VA 1-659-026

March 31, 2008

Watercolor 7



Reg. No. VA 1-347-290

March 30, 2006

Watercolor 8



Reg. No. VA 999-537

March 9, 2000

Watercolor 9



Reg. No. VA 1-749-893

Sept. 2, 2010

Watercolor 10



Reg. No. VA 540-656

Dec. 11, 1992

Watercolor 11



Reg. No. VA 1-716-637

July 31, 2008

Watercolor 12



Reg. No. VA 1-069-547

Jan. 16, 2001

Watercolor 13



Reg. No. VA 1-108-639

Nov. 5, 2001

Watercolor 14



Reg. No. VA 1-314-588

June 3, 2005

Watercolor 15



Reg. No. VA 1-726-831

July 27, 2009

Watercolor 16



Reg. No. VA 1-727-092

July 27, 2009

Watercolor 17



Reg. No. VA 1-406-828

April 6, 2007

Watercolor 18



Reg. No. VA 1-231-266

Aug. 12, 2003

Watercolor 19



Reg. No. VA 1-222-686

Nov. 10, 2003

Watercolor 20



Reg. No. VA 1-017-333

Aug. 13, 1999

83. For instance, Watercolor 8 is incorporated into the greeting card with the Copyright registration number of VA 999-537, as depicted below:



Watercolor 8



Registration No. VA 999-537
(March 9, 2000)

84. A completed copyright application registration for a greeting card incorporating Watercolor 15 has also been submitted to the U.S. Copyright Office. That application is currently pending before the Copyright Office.

**Zifen Qian Has Infringed Carol Wilson Fine Arts' Copyrights And
Has Refused To Acknowledge Carol Wilson Fine Arts' Ownership Of The Copyrights**

85. Zifen Qian has been, and is currently, displaying the Watercolors on his website, <http://zifenqian.com/>.

86. Screen shots from Zifen Qian's website, taken March 21, 2014, are attached as Exhibit C to this Complaint.

87. The screen shots in Exhibit C show, *inter alia*, the Watercolors.

88. Zifen Qian contends that he is the rightful owner of the copyrights in the Watercolors.

89. Zifen Qian contends that he is the rightful owner of the copyrights in all work he created for Carol Wilson Fine Arts.

90. On information and belief, Zifen Qian has photographed many of the works he created for Carol Wilson Fine Arts, including some or all of the Watercolors and/or the Registered Works.

91. In February 2014, Carol Wilson Fine Arts' attorney contacted Zifen Qian by mail, informing him that his actions violated the Copyright Act, and specifically, that Zifen Qian was violating the copyrights in works registered with the U.S. Copyright Office.

92. A copy of that letter is attached as Exhibit D to this Complaint.

93. That month, Zifen Qian replied to Carol Wilson Fine Arts' letter.

94. A copy of Zifen Qian's February 14, 2014 reply letter is attached as Exhibit E to this Complaint.

95. In that February 14, 2014 letter, Zifen Qian refused to cease his infringing activity.

96. In March 2014, Carol Wilson Fine Arts' same attorney again contacted Zifen Qian by mail, explaining in greater detail why Zifen Qian's actions violate the Copyright Act.

97. A copy of that letter is attached as Exhibit F to this Complaint.

98. That month, Zifen Qian replied to Carol Wilson Fine Arts' letter.

99. A copy of Zifen Qian's March 14, 2014 reply letter is attached as Exhibit G to this Complaint.

100. In that March 14, 2014 letter, Zifen Qian refused to cease his infringing activity.

101. Zifen Qian has notice that his actions infringe Carol Wilson Fine Arts' copyrights.

102. Zifen Qian is knowingly and willfully continuing to infringe Carol Wilson Fine

Arts' copyrights.

CLAIM ONE
(Copyright Infringement, 17 U.S.C. § 501)

103. Carol Wilson Fine Arts realleges and incorporates herein the preceding paragraphs 1 – 102 of this Complaint.

104. Carol Wilson Fine Arts holds registered copyrights in, and/or has submitted to the U.S. Copyright Office a complete copyright application for, each of the Registered Works.

105. Zifen Qian has reproduced, distributed, publicly displayed, and/or created derivative works from the Registered Works.

106. Zifen Qian has acted, and is acting, without the permission, license, consent, or authorization of Carol Wilson Fine Arts.

107. Zifen Qian's acts of copyright infringement have caused and are causing great and irreparable harm to Carol Wilson Fine Arts, its goodwill, and its rights in and to the Registered Works, in an amount which cannot be adequately determined at this time and, unless restrained, will cause further irreparable injury and damage, leaving Carol Wilson Fine Arts with no adequate remedy at law.

108. Zifen Qian's acts of copyright infringement have been and are being committed with actual knowledge of Carol Wilson Fine Arts' rights in the Registered Works, and are willful and in gross disregard of Carol Wilson Fine Arts' rights.

109. Carol Wilson Fine Arts is entitled to statutory damages of \$30,000 per registered work, amounting to \$510,000 for the 17 registered works infringed by Zifen Qian, with additional enhancement for willful infringement.

110. By reason of the foregoing, Carol Wilson Fine Arts is entitled to injunctive relief against Zifen Qian to restrain further acts of copyright infringement, and to recover any damages

proven to have been caused by reason of Zifen Qian's aforesaid acts of copyright infringement, and to recover enhanced damages based upon the willful, intentional, and/or grossly negligent activities of Zifen Qian.

CLAIM TWO
(Declaratory Judgment, 28 U.S.C. §§ 2201 & 2202)

111. Carol Wilson Fine Arts realleges and incorporates herein the preceding paragraphs 1 – 110 of this Complaint.

112. Zifen Qian contends that he is the rightful owner of the copyrights in all work he created for Carol Wilson Fine Arts, including the Registered Works.

113. Carol Wilson Fine Arts is the rightful owner of all copyrights in the work Zifen Qian created for Carol Wilson Fine Arts, including the Registered Works.

114. Zifen Qian has reproduced, distributed, publicly displayed, and/or created derivative works of works he created for Carol Wilson Fine Arts, including the Registered Works.

115. Zifen Qian is continuing to infringe Carol Wilson Fine Arts' copyrights in works Zifen Qian created for Carol Wilson Fine Arts, including the Registered Works.

116. An actual, substantial, and continuing justiciable controversy exists between Carol Wilson Fine Arts and Zifen Qian, requiring a declaration of rights by this Court.

117. Carol Wilson Fine Arts is entitled to a declaration that it is the owner of all copyrights in the works created by Zifen Qian for Carol Wilson Fine Arts, including the Registered Works, and that Zifen Qian has no rights to these works.

PRAYER

WHEREFORE, Carol Wilson Fine Arts prays for the following relief:

A. A permanent, nationwide injunction enjoining Zifen Qian from reproducing,

publicly displaying, distributing, creating derivative works based on, or otherwise infringing copyrights held by Carol Wilson Fine Arts, including the Registered Works;

B. An award to Carol Wilson Fine Arts of damages to compensate for Zifen Qian's infringement in an amount to be proven at trial, including Carol Wilson Fine Arts' actual damages and Zifen Qian's profits attributable to his infringement;

C. Statutory damages, pursuant to 17 U.S.C. § 504, of at least \$510,000;

D. An order directing Zifen Qian to remove from his website, <http://zifenqian.com/>, all materials that infringe Carol Wilson Fine Arts' copyrights;

E. An order directing Zifen Qian to return all originals and copies of works he prepared for Carol Wilson Fine Arts;

F. An award of Carol Wilson Fine Arts' costs and attorney fees, pursuant to 17 U.S.C. § 505;

G. A declaration that all works Zifen Qian created for Carol Wilson Fine Arts were made within the scope of Zifen Qian's employment and were works made for hire, and that Carol Wilson Fine Arts is the rightful copyright holder of all copyright rights in such works; and

H. Such other relief, in law or equity, to which Carol Wilson Fine Arts may be entitled, or which this Court may deem just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff Carol Wilson Fine Arts, Inc. hereby demands a jury trial as to all issues so triable in this action.

Dated: April 9, 2014

By: s/ Stephen J. Joncus
Stephen J. Joncus, OSB #013072
Email: stephen.joncus@klarquist.com
N. Andrew Sfeir OSB #131787

Email: andy.sfeir@klarquist.com
KLARQUIST SPARKMAN, LLP
121 S.W. Salmon Street, Suite 1600
Portland, Oregon 97204
Telephone: 503-595-5300
Facsimile: 503-595-5301

Attorneys for Plaintiff
CAROL WILSON FINE ARTS, INC.